In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 850

W. C. TUCKER, PETITIONER,

v.

ACEL C. ALEXANDER, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the District Court. Its judgment and findings will be found at page 73 of the record. The opinion of the Circuit Court of Appeals (R. 86) is reported in 15 F. (2d) 356.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 1, 1926. (R. 90.) A petition for rehearing was

denied January 15, 1927. (R. 96.) The petition for writ of certiorari was filed January 24, 1927. Jurisdiction to issue the writ applied for is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938).

THE QUESTION

In this case the question is, whether a taxpayer who has paid income taxes assessed against him for a certain year, and has filed a claim for refund of the taxes alleging two certain claims of error and stating that in all other particulars the Commissioner is correct, may when suing to recover the taxes paid, recover on a different ground of error from those set forth in his claim for refund.

STATEMENT

The petitioner was duly assessed additional income taxes for the year 1920 in the sum of $8,610.84, which taxes were duly paid under protest. (R. 3–4.) Thereafter, petitioner filed with the Commissioner of Internal Revenue his claim for refund of the said taxes on the form provided in accordance with the regulations, and stated the following reason why the refund should be allowed (R. 9):

> That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said Company as

> fully appears from his appeal to the Commissioner from the proposed assessment of additional tax, dated August 10, 1923, designated IT: PA: FR–JRC–708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim.

In the above-mentioned appeal to the Commissioner the taxpayer stated as his ground of appeal (R. 57):

> The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1913, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report.

After six months had expired without any decision by the Commissioner on the claim for refund, taxpayer brought this action in the District Court for the Western District of Oklahoma to recover said taxes claimed to have been illegally assessed

and collected. The grounds for recovery differed from those alleged in the claim for refund, and, as set up in the petition, are (R. 4):

> That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000 divided into 150 shares of the par value of $100 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000 divided into 300 shares of the par value of $100 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed in specie to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount

> on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took $356.86 per share, instead of the correct sum of $500 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders * * *.

After trial in the District Court, judgment was entered against the petitioner. (R. 73.) Petitioner then took the case to the Circuit Court of Appeals on writ of error, setting up eleven assignments of error (R. 78), those material here being as follows (R. 79):

> 3. The court erred in refusing to find and include a good will value of at least $100.00 a share in the fair market value of the stock of the plaintiff in error in the Osage Mercantile Company on March 1st, 1913, and in refusing to take such fair market value as the basis for determining the plaintiff's gain or loss on his said stock on liquidation of the said corporation on July 20, 1920.
>
> 4. The court erred in finding that whatever good will was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders

with the distribution in kind of its tangible assets to them.

5. The court erred in finding that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.43 declared from surplus earned prior to March 1, 1913, were to be excluded from the assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as a basis for determining the gain realized by the plaintiff at liquidation of said company on the stock held by him.

The Circuit Court of Appeals affirmed the judgment of the District Court (R. 90), holding that the petitioner could not maintain an action to recover the taxes on a ground not alleged in the claim for refund but on an entirely distinct and separate ground which was not called to the Commissioner's attention in the claim for refund. (R. 86 et seq.)

Petitioner asks that this case be reviewed by this Court on the ground that the decision of the said Circuit Court of Appeals is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, and on the ground that the decision of the Circuit Court of Appeals below presents "three important questions of federal law which have not been, but should be, settled by this court." (Pet. 19, 22.)

STATUTE INVOLVED

Section 3226 of the Revised Statutes, as amended by Section 1014 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 343), provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

> (b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Article 1036 of Treasury Regulations 45 (1920 Ed.) provides:

> Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 46 (revised). In this case, as in that of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

ARGUMENT

THIS COURT HAS ALREADY DECIDED THE QUESTION INVOLVED IN THIS CASE

Petitioner's contention that he is entitled to set up certain grounds for relief in his claim for refund and then bring an action in court based upon distinctly different grounds, assailing action of the Commissioner of Internal Revenue which he had accepted as correct in his prior claim before the Commissioner is contrary to the principles stated in the decisions of this Court in *Nichols* v. *United States,* 7 Wall. 122, and *Girard Trust Co.* v. *United States,* 270 U. S. 163. Compare also *Kings County Savings Institution* v. *Blair,* 116 U. S. 200; *Rock Island, etc., R. R. Co.* v. *United States,* 254 U. S. 141; and *Hicks* v. *James,* 48 Fed. 542, affirmed 110 U. S. 272.

As early as 1868 this Court, in *Nichols* v. *United States, supra,* held that under the laws of Congress then in force relating to the recovery of duties paid under protest, a written protest signed by the party, with a statement of the different grounds of objection to the duties demanded and paid, was a necessary condition precedent to suit for refund. This Court said (p. 131):

> The object of these different provisions is apparent. While the government is desirous to secure the citizen a mode of redress against erroneous assessments or collections, it says to him, we want all controverted questions concerning the revenue settled speedily, and if you have complaint to make, you must let the Commissioner of Internal Revenue know the grounds of it; but if he decides against you, or fails to decide at all, you can test the question in the courts if you bring your suit within a limited period of time.

As late as 1926, in *Girard Trust Company* v. *United States,* 270 U. S. 163, this Court approved the above ruling in the following language (p. 172):

> The Government's contention is that the distinction made in Section 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after the

> date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.
>
> We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once.

These cases dealt with protests, not claims for refund, but the principle is applicable to both.

The statute provides that no action shall be maintained to recover taxes illegally assessed until a claim for refund has been filed according to regulations established by the Secretary of the Treasury.

The regulations of the Secretary of the Treasury and the forms provided therein require the taxpayer to state the reasons on which his claim for refund is based. The necessary effect is to deny relief in the courts on grounds not stated in the claim for refund. To hold otherwise would nullify the statute and regulation in so far as they require the grounds of the claim to be stated to the Commissioner. In the instant case, after setting forth his reasons, petitioner expressly states (R. 57) that "in all other respects the taxpayer accepts

the Revenue Agent's report," so that not only did he fail to allege in his claim for refund the grounds on which in this action he claims the taxes were illegal, but he had previously stated to the Commissioner that no other grounds existed and that he approved the action of the Commissioner in all other particulars.

The case of *Walker* v. *Gulf & I. Ry. Co.*, 269 Fed. 885, relied upon by petitioner is not in conflict with the court's ruling in the instant case. That case is simply authority for the rule that ordinarily an appellate court will not consider errors which were not raised in the trial court.

CONCLUSION

The question involved in this case was correctly determined in accordance with the plain provisions of the statute and with the decisions of this Court. It is respectfully submitted that the prayer of petitioner should be denied.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEWALL KEY,
Attorney.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

FRED W. DEWART,
Special Attorney, Bureau of Internal Revenue.

FEBRUARY, 1927.

○